No. 80-1443

ALEXANDER L. STEVAS, CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SAPAG, S.A., *Petitioner,*

v.

STANDARD FITTINGS COMPANY, *Respondent.*

BRIEF OF RESPONDENT STANDARD FITTINGS COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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PRELIMINARY STATEMENT

Respondent, Standard Fittings Company, respectfully submits that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit should be denied, and the cause should not be reviewed by this Court. In support of this submission, respondent files this Brief in Opposition pursuant to this Court's Rule 22.

This is a familiar type of jurisdictional dispute arising in the context of an action alleging breach of a commercial, exclusive distributorship contract [1] be-

[1] Petitioner disputes the characterization of the agreement as an "exclusive distributorship" contract. The Court of Appeals properly so characterized it. *E.g.*, 625 F.2d 630, 633, 643, 644, Pet. App. A-1, A-7, A-8, A-33, A-34, A-35.

tween a resident of the forum state (respondent) and a foreign entity (petitioner). *In personam* jurisdiction was based upon Louisiana's Long-Arm Statute.[2] The defendant-petitioner moved for dismissal of the action on the grounds that it is not amenable to the personal jurisdiction of a court in Louisiana under the Louisiana Long-Arm Statute and principles of constitutional due process (625 F.2d 630, 631, Pet. App. A-1). The District Court granted the motion, primarily on the basis of its construction of the Louisiana statute. (See *infra*).

The Fifth Circuit reversed (Anderson III, Gee and Tjoflat, JJ). It held that the requirements of both the Louisiana statute and due process were satisfied and remanded the cause for trial on the merits. Respondent submits that its decision should not be reviewed by this Court for the following reasons:

1. The petition, on its face, is fatally defective. As is shown by a mere comparison of the petition with the opinion of the court below, petitioner's "Statement of the Case" (Pet., pp. 3-7) omits essential facts, nor are these facts set forth elsewhere in the petition. *Cf., e.g.,* Pet. pp. 3-7, with the court's summary. 625 F.2d at 643-644, Pet. App. A-32—A-34. As provided by this

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[2] The Louisiana Long-Arm Statute in part reads as follows:

§ 3201. Personal jurisdiction over nonresidents.

A court may exercise personal jurisdiction over a nonresident, who acts directly or by an agent, as to a cause of action arising from the nonresident's

(a) transacting any business in this state;

(b) contracting to supply services or things in this state;

Because the Court of Appeals found that the requirements of subsection (a) were met, it did not address itself to subsection (b). See last paragraph, fn. 14, 625 F.2d at 637, Pet. App. A-15.

Court's Rule 21.5, this failure "to present with accuracy, brevity, and clearness" the relevant facts is "a sufficient reason for denying [the] petition".

2. The petition does not, in general terms, challenge the decision on due process grounds. The Questions Presented do not challenge the legal basis upon which the Fifth Circuit decided the case or its application of the law to the facts. Petitioner states two "Questions Presented". Neither question is presented by the case before this Court. Neither relates to an issue decided by the court below, either expressly or by implication.

a. The first Question Presented assumes that the court below decided that personal jurisdiction "is constitutionally justified by the fact" that the resident plaintiff secured a letter of credit from a forum bank in favor of the foreign defendant. The court below did not so decide. It held that personal jurisdiction was appropriate on the basis of the totality of relevant facts.

b. The second Question Presented (although it is far from clear) erroneously states that the court below somehow attached special weight to Louisiana's interest in the controversy, and requests this Court to determine "what kind or degree of interest in the controversy must the forum state have" before that interest supports the exercise of personal jurisdiction. (See, *e.g.*, Pet., p. 20). The court below did not refer to or rely upon any special or "particularized interest" of the forum state beyond a state's conventional right and, indeed, its obligation to make its courts available to its citizens in appropriate cases. Nor is there any requirement of law that a state must have a "particularized interest".

This Court's Rule 21.1 provides that only the questions set forth in the petition for a writ of certiorari or fairly included therein will be considered by the Court. Since the only questions presented herein are obviously and facially inappropriate for consideration by the Court, the petition should be denied.

3. The decision of the court below as to the construction of the Louisiana Long-Arm Statute is clearly correct and mandated by decisions of the Louisiana courts and other Louisiana authorities, and, in any event, the question of local law is inappropriate for review by this Court. 625 F.2d 637-641, Pet. App. A-14—A-25.

4. The decision below is essentially factual and represents a sound application of established principles of law to the facts of this case. There is no reason why the writ should be granted; there is no federal question which has been decided in a way which conflicts with any decision of this Court, and there has been no departure from the accepted and usual course of judicial proceedings.

5. The case does not present a conflict with any decision of any Court of Appeals.

THE FACTS

In view of petitioner's defective statement, an abbreviated summary of the relevant facts found by the court below is appropriate (625 F.2d at 643-644, *passim*, Pet. App. A-32—A-36, *passim*).[3]

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[3] Petitioner does not contest any of the findings of the court below relevant to the jurisdictional issue. In its petition to this Court petitioner does not mention visits of petitioner's officers and agents to Louisiana and their activities in the state to promote

1. Petitioner is a manufacturer in France of high-pressure fittings, valves, unions and other items. Respondent is engaged in the manufacture, purchase, sale and distribution of the same types of products. Respondent's plant and principal offices are in Opelousas, Louisiana. 625 F.2d 631, Pet. App. A-1.

2. In late 1973, the French sales manager of petitioner (LeLievre) and its United States marketing consultant and representative (Frederick) traveled to Louisiana soliciting business on behalf of petitioner (625 F.2d 632, Pet. App. A-4—A-5) and seeking a distributor for petitioner's products in America. As a result of petitioner's visit to another company in Louisiana engaged in the business, respondent learned of petitioner's interest and communicated with petitioner's marketing consultant who mailed petitioner's catalog and samples to respondent. —No mention of these facts is made in the petition.

3. An agreement between petitioner and respondent was signed in Paris on February 19, 1974, in the course of a visit by respondent's chief executive to petitioner's offices in Paris. This provided for purchase and sale of petitioner's products and contemplated that respondent would become exclusive distributor of petitioner's products in the United States. It also provided that petitioner would ship its products at respondent's direction anywhere in the world except Europe.

4. After various exchanges of correspondence, in June 1974, petitioner's representative, Frederick, visit-

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their products and arrange for a distributor thereof, and to discuss and settle matters which arose with respect to performance of the contract. These are of obvious and cardinal significance to the decision below and are summarized in the Fifth Circuit's opinion.

ed respondent's plant in Opelousas, Louisiana. In February 1975, petitioner's French sales manager (Le Lievre) and another of its French officials (Patteeuw) visited respondent in Louisiana and discussed the agreement, the performance thereunder, and problems which had arisen. 625 F.2d 633-634, Pet. App. A-8—A-10. —No mention of these activities of petitioner in Louisiana is made in the petition.

5. The agreement contemplated continuing and substantial sales of petitioner's products, and significant sales and deliveries were in fact made prior to the alleged breach of the agreement by petitioner.

6. The agreement provided that payment for petitioner's products sold under the contract would be made by letter of credit issued by an acceptable North American bank. Respondent arranged for such letter of credit to be issued by a Louisiana bank, and petitioner accepted the designation of the Louisiana bank and requested that the letter of credit issued by the Louisiana bank be renewed upon its expiration. —The only reference to the letter of credit in the court's opinion appears in a summary listing of petitioner's activities and a brief reference thereto in the following paragraph. 625 F.2d 644, Pet. App. A-33—A-34. Petitioner's request that the letter of credit with the Louisiana bank be extended appears in the record. Letter of LeLievre to Davlin, March 10, 1975.

THE OPINIONS BELOW

The District Court, reviewing the documentary evidence and affidavits, held that it did not have *in personam* jurisdiction of the petitioner. It reached this conclusion essentially on the basis of its construction

of the Louisiana Long-Arm Statute, specifically, L.R.S. 13:3201(a), which sets forth one of the bases upon which personal jurisdiction over a non-resident may be exercised: namely, "as to a cause of action arising from the nonresident's (a) transacting any business in this state". The District Court held that this provision required "the finalization of a negotiation process" in Louisiana (448 F.Supp. 426, 429-430, Pet. App. B-8). Primarily because the contract between the parties was not "finalized" in the state, but was executed in Paris, the District Court held that the requirement of the statute for *in personam* jurisdiction was not satisfied. The District Court's only point with respect to the due process requirement was that the relevant "principle of constitutional due process", "is animated by a notion of fairness" and that in the present case "it is not 'unfair' to conclude that the non-resident has vouchsafed his right to be sued only at his own domicile". 448 F.Supp. 430, Pet. App. B-9—B-10.[4]

On appeal, the Fifth Circuit, carefully reviewing Louisiana decisions and authorities, held that the District Court's construction of the Louisiana law was erroneous. It held that the phrase "transacting business" under the Louisiana statute does not require, as the District Court found, "finalization of the negotiation process". On the contrary, citing numerous Louisiana precedents and authorities, it held that Louisiana decisions have established that its Long-Arm Statute "was intended to permit the exercise of *in personam* jurisdiction to the full limits of due process" (625 F.2d 638 ff., Pet. App. A-17 ff.), and that "Business

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[4] As the Fifth Circuit's opinion demonstrates, the District Court totally failed to refer to or note various significant contacts and activities of the non-resident petitioner in the forum state.

activity which will satisfy the requirements of due process will thus necessarily satisfy the 'transacting business' requirement of the Long-Arm Statute".[5]

Turning to the due process requirement, the Fifth Circuit reviewed the criteria established by this Court as essential to subject a non-resident defendant to *in personam* jurisdiction,[6] and it reviewed its own prior decisions on the subject. 625 F.2d 641-643, Pet. App. A-25—A-32. It summarized petitioner's activities, and held that "in combination", those activities "bring Sapag [petitioner] within the boundaries of the Louisiana Long-Arm Statute and the principles of due process. . . ." 625 F.2d 643, Pet. App. A-32. Specifically, it held that "sufficient minimum contacts" with the state were demonstrated; that "Sapag reasonably should have anticipated being haled into court in Louisiana"; and that "it is not unfair or unreasonable to require Sapag to defend a suit in Louisiana", particularly in light of "Sapag's purposeful acts availing itself of the benefits of conducting business in Louisiana". 625 F.2d 644-645, Pet. App. A-35—A-36.[7] Accordingly, it reversed the District Court's decision and remanded the cause for trial.

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[5] The court's careful review of the Louisiana authorities appears at 625 F.2d 638-641, Pet. App. A-14 - A-25. A leading Louisiana case is its Court of Appeal's decision in *Aucoin* v. *Hanson*, 207 So. 2d 834, 836 (La. App. 1968) (625 F.2d 640, Pet. App. A-23 ff.).

[6] *International Shoe Co.* v. *State of Washington*, 326 U.S. 310, 66 S.Ct. 154 (1945); *McGee* v. *International Life Insurance Company*, 355 U.S. 220, 78 S.Ct. 199 (1957); *Hanson* v. *Denckla*, 357 U.S. 235, 78 S.Ct. 1228 (1958); *World-Wide Volkswagen Corporation* v. *Woodson*, 444 U.S. 286, 100 S.Ct. 559 (1980).

[7] Although not specifically noted by the court below, the delays of civil litigation in the French courts are common knowledge.

ARGUMENT

1. The "Non-Issues" Stated by the "Questions Presented"

At the outset, we submit that the petition herein is fatally defective under this Court's Rules. It purports to state two "Questions Presented".[8] The first "Question Presented" is "Whether the exercise of personal jurisdiction over a foreign defendant is constitutionally justified by the fact that the plaintiff, a resident of the forum state, unilaterally chose to secure a letter of credit from a forum bank in favor of the foreign defendant?" --No such issue is presented. It is not remotely possible to read the Fifth Circuit's opinion as a holding that, standing alone, the obtaining of a letter of credit in the forum state, under whatever circumstances, justifies *in personam* jurisdiction. The letter of credit transaction in the present case was merely one of many factors found by the court as establishing "in combination" the facts necessary to sustain jurisdiction. It does not appear in any way that the court attached special importance to the letter of credit or that its absence would have induced a different result.[9]

Much of petitioner's submission is devoted to argument attempting to support this non-issue as to the letter of credit. Petitioner erroneously argues, on the purported basis of the Ninth Circuit's decision in *Thos. P. Gonzalez Corp.* v. *Consejo National de Produccion*

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[8] Rule 21.1(a) states that "Only the questions set forth in the petition or fairly included therein will be considered by the Court".

[9] There is factual justification in this case for considering the letter of credit issued by a Louisiana bank to be an activity of petitioner in the forum state because respondent arranged for it at the reiterated request of petitioner to assure payment, that selection of the Louisiana bank was approved by petitioner, and that petitioner requested its extension. (*Supra*).

de Costa Rica, 614 F.2d 1247 (9th Cir. 1980), that there is a conflict between the Ninth and Fifth Circuits as to the significance, for due process purposes, of a letter of credit obtained from a forum bank. In *Gonzalez,* there were no "contacts" of defendant in the forum state except, arguably, the circumstances relating to the letter of credit. Additionally, the facts concerning the letter of credit were fundamentally different from those in the present case. In *Gonzalez,* the non-resident defendant did not itself contract for, cause or approve the issuance or more accurately, the "confirmation" of the letter of credit by a bank in the forum state.[10] Indeed, the facts in *Gonzalez* and the present case are so different that, even if it could rationally be said that the present case decides a point of law concerning the significance of letters of credit (which is not the case), it could not plausibly be urged that the two cases represent a conflict justifying review by this Court.

The second "Question Presented" by petitioner is a request that this Court decide "what kind or degree of interest in the controversy must the forum state have before that interest becomes a factor properly supporting the exercise of personal jurisdiction?" It is not possible to ascertain with any assurance the point that petitioner is seeking to make. At times petitioner seems to argue that the court below "improperly attaches jurisdictional significance to Louisiana's interest in this controversy". No such inference can be

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[10] As the Ninth Circuit found in *Gonzalez*, the defendant (a Costa Rican agency) "made payment [for purchased grain] by having its bank in Costa Rica issue letters of credit which [a bank in the forum state] confirmed, although the contracts specified only that payment be by letter of credit in United States or Costa Rican currency". (614 F.2d at 1249).

drawn from the court's opinion. The only references to Louisiana's "interest" are in terms of Louisiana's general interest (like that of all states in instances where jurisdiction is appropriate) "in providing a forum for litigating a breach of a major contract which proposed to establish a Louisiana based company as the exclusive distributor in North America for [petitioner's] products". 625 F.2d 644, Pet. App. A-35. It is in this general context that the court refers to *McGee* v. *International Life Insurance Company,* 355 U.S. 220, 78 S.Ct. 199 (1957): that is, as authority for a state's exercising *in personam* jurisdiction over a non-resident to vindicate its "interest in providing effective means of redress for its residents . . ." where the suit is "based on a contract which had substantial connection with that State". 625 F.2d 641, Pet. App. A-26—A-27.

Alternatively, petitioner may be saying that this Court has required that a state must have a special or "particularized interest" in the cause in order to exercise personal jurisdiction over a non-resident, and it may be requesting this Court to define that "particularized interest". (See Pet. 17 (caption), 20). Petitioner invokes *Kulko* v. *Superior Court of California,* 436 U.S. 84, 98 S.Ct. 1690 (1978), apparently asserting that *Kulko* requires that a state must have a "particularized interest" in order that it make its courts available to its residents in suits against non-residents. *Kulko,* of course, does not so hold. On the contrary, it holds that *despite* California's significant interest in the controversy (relating to support of children resident in California), there was an absence of the minimum contacts necessary to sustain personal jurisdiction against the non-resident defendant. —We know of no case, in fact, which requires a "particularized in-

terest" in the forum state, other than the state's general interest in the welfare of its residents, in order to sustain the state's action in making its courts available to its residents in controversies with foreign residents, where appropriate in accordance with due process requirements.

2. The Construction of Local Law

Petitioner does not challenge the Fifth Circuit's ruling as to the construction of the Louisiana Long-Arm Statute. Obviously, that ruling would not and does not present an issue for review by this Court. Accordingly, we briefly note (see *supra*) that the Fifth Circuit overruled the District Court's conclusion that Section 13:3201(a) of the Louisiana Long-Arm Statute requires that the "negotiation process" must be "finalized" in the state in order to provide a basis for personal jurisdiction over a non-resident defendant. 448 F.Supp. 429, Pet. App. B-8. Since the agreement of the parties was executed in Paris, the District Court held that this requirement was not satisfied.[11] The Fifth Circuit, on appeal, after a comprehensive analysis of Louisiana cases and authorities, held that this was error; that the phrase "transacting business" "does not require finalization of the neogtiation process"; and that "The Louisiana courts have repeatedly stated without qualification that § 13:3201 was intended to extend to the limits of due process". Its conclusion is clearly correct. 625 F.2d 637-641, Pet. App. A-14—A-25.

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[11] As the Fifth Circuit noted, the District Court did not consider whether *in personam* jurisdiction was justified by L.R.S. 13:3201(b) relating to "contracting to supply services or things in this state". (See *supra*).

3. Due Process: The Decision Below is Correct and Presents No Reason for Review by this Court [12]

The opinion below, as we have shown, is based upon a sound application of the conventional due process standards: the existence of requisite minimum contacts so that maintenance of the suit does not offend traditional notions of fair play and substantial justice; the defendant purposefully avails itself of the privilege of conducting activities within the forum state; the foreseeability "that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there"; and the "fairness" of subjecting the foreign defendant to defense of the action in the forum state in view of the nature and quality and purposefulness of its activities therein. 625 F.2d 641-646, Pet. App. A-25—A-32.

The court below, recognizing that its "inquiry into the applicability of the Louisiana Long-Arm Statute and the due process implications . . . is a fact sensitive one", properly and carefully applied these standards to the facts of this case. 625 F.2d 631, Pet. App. A-2. In brief, it demonstrated that the requirements of law were satisfied by the facts that petitioner came to Louisiana "to promote its product" and to seek to make an arrangement in that state by which a resident therein would undertake the functions of American distributor of its merchandise; that it engaged in activities "to further performance" of the agreement by its distributor in Louisiana and resolve difficulties which had arisen, "including on two occasions activities by [petitioner's] agents in the State of Louisiana"

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[12] The petition herein does not seek review on the due process issue generally, but because it is fundamental to Long-Arm cases, we briefly discuss it.

(625 F.2d 644, Pet. App. A-34); that the agreement contemplated "continuing and substantial sales" by the distributor in Louisiana of petitioner's products and, in fact, significant performance took place prior to the alleged breach; and that performance was contemplated and in fact occurred by "management [in Louisiana] of the exclusive distributorship of [petitioner's] products" (625 F.2d 644, Pet. App. A-34), and "payment to [petitioner] through a Louisiana bank" pursuant to the agreement and with respondent's approval and upon its request. On this basis, the court below held that "the nature and quality of these contacts—having as their purpose the establishment of the Louisiana based company as the exclusive distributor for [petitioner's] products in North America—reveal the kind of purposeful activity which has been held to constitute sufficient minimum contacts. . . . [Petitioner] reasonably should have anticipated being haled into court in Louisiana". The court then proceeded to "hold, further, that it is not unfair or unreasonable to require [petitioner] to defend a suit in Louisiana" in view of the circumstances, particularly petitioner's intention and activities "to establish a Louisiana based company as the exclusive distributor in North America" for its products. 625 F.2d 644, Pet. App. A-34—A-35.[13]

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[13] We suggest that it is particularly appropriate that Long-Arm Statutes be available to residents of a state who, by contract, undertake the obligations of an exclusive distributorship of the products of a foreign supplier. As here, the resident distributor, by agreement with the non-resident undertakes a continuing and substantial obligation, substantially performable in the forum state, to promote the supplier's product—sometimes, as here, in competition with the distributor's own products. Breach of the arrangement, after the resident has invested in promoting the non-resident's

CONCLUSION

For the foregoing reasons, respondent submits that this cause should not be reviewed by this Court and the petition should be denied.

Respectfully submitted,

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products, has a severe and sometimes destructive impact upon the resident's business in the forum state for which accessible remedy is essential. In these circumstances, remitting the injured distributor to suit in a foreign jurisdiction [France] provides an incentive to the non-resident to terminate, transfer or take over the distributorship after the resident has established a market for the products. This type of situation does not present the difficult and subtle balancing of considerations present, for example, in ***World-Wide Volkswagen, supra.***